MOTION FILED
MAY 23 1996

(15)

No. 95-974

IN THE

Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,

Petitioners,

v.

State of Arizona; Maria-Kelley F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF VACATING OR REVERSING JUDGMENT ENTERED BELOW

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May 23, 1996

Balmar Legal Publishing Department, Washington, DC (202) 682-9800

30 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF VACATING OR REVERSING THE JUDGMENT BELOW

COMES NOW U.S. English Inc. ("U.S. English"), by counsel, pursuant to Supreme Court Rule 37, and moves this Court for leave to file a brief *amicus curiae* in support of vacating or reversing the judgment below. In support of this motion, U.S. English states as follows:

1. U.S. English has approximately 600,000 members nationwide, and worked to obtain enactment of Article XXVIII of the Arizona Constitution (the "Arizona Amendment") at issue here.

2. U.S. English filed briefs *amicus curiae* in the Court of Appeals in this case, and also filed a brief *amicus curiae* in support of the Petition for Certiorari which was granted by this Court on March 25, 1996.

3. U.S. English is currently promoting legislation similar to the Arizona Amendment in numerous other jurisdictions, including H.R. 123 in the U. S. Congress, and this case will have an important affect on such legislation. See J. A. 153-155.

4. This Court has asked the parties to brief the issue of whether this case is moot as to plaintiff-respondents Yniguez and Guiterrez.

5. We understand that Petitioners' brief will not focus on the issue of whether this case is moot. The *amicus brief* submitted by U.S. English discusses the issue of mootness in detail, in light of the State of Arizona's official position that the Arizona Amendment only applies to "official acts," and in light of the fact that neither plaintiff-respondent Yniguez or Gutierrez is currently employed by the State of Arizona.

6. Another threshold issue in any case before this Court is the scope of the Court's power of constitutional adjudication.

7. The Petition discussed briefly the principle of constitutional adjudication that the Arizona constitutional provision in issue must be given all reasonable constructions in order to save it from facial invalidation. The *amicus curiae* brief submitted by U.S. English discusses this principle in greater detail, especially as applied to the Constitutional provision here, which was enacted by initiative.

8. The *amicus curiae* brief submitted herewith also discusses in greater detail the authoritative construction of the Arizona Amendment in issue, and the error of the lower in ignoring this construction. A copy of the formal Opinion of the Attorney General is printed in the Joint Appendix.

9. Barnaby W. Zall, Esq., counsel for Petitioner Arizonans for Official English, does not consent to this motion.

10. All other parties consent to this motion.

WHEREFORE, it is requested that the Court issue an order granting U.S. English leave to file the attached *amicus curiae* brief in support of Petitioner.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

U.S. English is a national nonprofit organization with over 600,000 members. Its purpose is to promote legislation and programs to establish English as the official language of governments.

U.S. English has a substantial interest in this litigation because it involves the constitutionality of Article XXVIII of the Arizona Constitution, entitled "English as the Official Language" (the "Amendment"). U.S. English assisted in the initiative which resulted in the Amendment, filed briefs in the Court of Appeals below, filed a brief in support of the Petition for Certiorari, and is currently promoting official English statutes in Congress and other states.

Any meaningful official English statute must necessarily employ broad language and rely heavily on administrative interpretations and implementations by attorneys general or other administrative officials. The lower courts' refusal to give effect to the Amendment's construction by the Arizona Attorney General, and their facial invalidation of the Amendment, will make it extraordinarily difficult to fashion similar legislation in other jurisdictions if the opinion below is allowed to stand.

U.S. English respectfully submits that this case is moot and the judgment below should be vacated. Assuming, however, that the Court reaches the merits of this case, U.S. English respectfully submits that Judge Reinhardt's majority opinion below is in direct conflict with prior decisions of this Court which held that facial invalidation is not appropriate, where, as here, the challenged provision has a broad range of plainly legitimate applications. The lower courts should have adopted the careful opinion of the Arizona Attorney General which narrows the scope and impact of the Amendment and cures all constitutional concerns.

FACTS

In October of 1987, Arizonans for Official English ("AOE") initiated a petition drive which culminated in the 1988 passage by ballot initiative of Article XXVIII of the Arizona Constitution, entitled "English as the Official Language" (the "Amendment"). J. A. 158.

At the time the Amendment was adopted by the voters of Arizona, Plaintiff-Respondent Yniguez was employed by the Arizona Department of Administration, where she handled medical malpractice claims asserted against the state. *Id.* at 159. Yniguez communicated in Spanish with mono-lingual Spanish-speaking claimants, and used a combination of English and Spanish with bilingual claimants. *Id.* at 47. Yniquez also drafted various settlement documents, some in English and/or Spanish. *Id.* at 48. After the passage of the Arizona Amendment, however, Yniguez ceased speaking Spanish on the job for fear that her use of Spanish made her vulnerable to disciplinary measures. *Id.* at 159.

In November of 1988, Yniguez filed this lawsuit against the state of Arizona and various state officials. *Id.* Yniguez' complaint was later amended to add Plaintiff-Respondent Gutierrez, a state senator who desired to speak Spanish to his Hispanic constituents. *Id.* at 56-57.

Approximately two months after Yniguez initiated this action, the Arizona Attorney General issued a lengthy opinion defining the scope of the Arizona Amendment. *See* Arizona Attorney General Opinion I89-009, reprinted in the Joint Appendix at J.A. 61-76. The Attorney General's opinion made clear that the Amendment's English mandate only applied to "official acts" of the Arizona government, including all "official documents." J. A. 62, 65, 68, 71-72. The Opinion also stated that "provision of non-English assistance, whether written or oral, is permissible, and *is required* if it is necessary to reasonably provide fair and effective services;" that "translation services and accommodating communications are

permissible, *and may be required* if reasonably necessary to the fair and effective delivery of services"; and that generally non-English languages may be used to facilitate "the fair and effective delivery of governmental services" or "when reasonable to facilitate the day-to-day operation of government." *Id.* at 63-64, 71, 72, 73, 74. (emphasis added). In addition, the Opinion concluded that "Communications between elected and other governmental employees with the public at large may be in a language other than English," and that the "State may act in a language other than English . . . to comply with [the United States Constitution and] other federal laws." *Id.* at 62, 74.

During proceedings in the lower courts, the Attorney General's office filed briefs and presented oral argument in which this Opinion was set forth as the official position of the State of Arizona.[1] The district court, however, rejected the Attorney General's opinion and entered a broad declaratory judgment facially invalidating the entire Arizona Amendment. No application of the Amendment was saved.

The State decided not to appeal the district court's decision. Therefore, AOE, as the official sponsor of the Arizona Amendment, sought leave of court to intervene for purposes of pursuing an appeal of the district court's order. J. A. 94. Leave to intervene was granted, and an appeal was filed. *Id.* at 185, 206.

Sometime in 1990 Yniguez voluntarily left state employment. *Id.* at 187. At about the same time, Plaintiff Gutierrez also left State office. The State filed a suggestion of

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[1] In his briefs in the lower courts, the Attorney General repeatedly confirmed that his Opinion is "the official position of the State of Arizona on the proper interpretation" of the Amendment (*e.g.*, Br. of State of Arizona, 9th Cir. No. 93-15719, p. 3, fn. 1), and that the Amendment "app[lies] only to 'official' acts and "official government functions of actions", but not to "[r]outine conversations, instructions and communications with agencies or citizens" (*id.* at 5, 6, 7).

mootness, but the Ninth Circuit held that the case was not moot because Yniguez had a right to appeal the trial court's failure to award nominal damages, even though Yniguez did not specifically request nominal damages in her complaint or at trial. *Id.* at 205. Taking her cue from the Ninth Circuit, Yniguez then filed a cross-appeal requesting nominal damages. *Id.* at 209.[2]

On November 7, 1995, the district court awarded Yniguez $1.00 in nominal damages. *Id.* at 211. Neither Plaintiffs-Respondents nor Petitioners appealed this award. *Id.* at 5.

The Ninth Circuit, in a divided *en banc* opinion, affirmed the district court's sweeping declaratory judgment on October 5, 1995. J.A. 210.

SUMMARY OF ARGUMENT

Petitioners are sponsors of an initiative Amendment of the Arizona Constitution which was adopted by the voters of Arizona. Plaintiffs-Respondents are two former State employees whose rights to speak or write Spanish while working were allegedly infringed by the Amendment. Shortly after Plaintiffs filed suit to declare the Amendment unconstitutional, the defend[illegible] Attorney General published a lengthy opinion stating that the Amendment did not prevent State employees such as Plaintiffs from speaking or writing in non-English languages to facilitate provision of governmental services, and that the Amendment only required that the official version of official acts such as laws, court opinions, deeds, and the like be written in English. During proceedings below, the State Attorney General repeatedly confirmed this Opinion as the official position of the State. While the case proceeded, Plaintiffs voluntarily left State employment. The district court awarded $1.00 nominal damages to the two

[2] The request for nominal damages seems to have been contrived at the appellate stage of this litigation in an effort to save the case from mootness.

Plaintiffs, and they did not appeal this award. In addition, the lower courts issued a broad declaratory judgement which facially invalidated the Amendment, preventing its application in any circumstance.

1. Plaintiffs' suit for declaratory relief is moot, requiring vacating of the judgements below. Even in a First Amendment overbreadth case, the courts require that an actual case or controversy exist between the parties. *E.g.*, *Poe v. Ullman*, 367 U.S. 497 (1961). Here, both Plaintiffs voluntarily left State employment during the lower court proceedings, and the case was never certified as a class action. Accordingly, they have no legally cognizable interest in the declaratory relief issued below.

Alternatively, where, as here, State officials agree that legislation is inapplicable to claimants, the Court has repeatedly held that the case is moot. Moreover, Plaintiffs have never disputed that Arizona may constitutionally require statutes, court opinions, deeds and other similar "official acts" to be written in English, consistent with the Attorney General's Opinion.

Plaintiffs cannot circumvent mootness by relying on their claim for damages. The Attorney General promptly ruled that the Amendment did not apply to Plaintiffs' duties; thus, Plaintiffs suffered no injury. Indeed, Plaintiffs did not claim any damages in their original complaint. Only after mootness was suggested on appeal did Plaintiffs add a damages claim to their complaint. The District Court, however, awarded only one dollar nominal damages, and Plaintiffs did not appeal that award. Where damages are purely incidental to the main declaratory claim, and are insubstantial or nominal, they will not preserve the court's jurisdiction.

Likewise, the presence of intervenor-plaintiff Arizonans Against Constitutional Tampering ("ACT") does not create a case or controversy where none otherwise exists. ACT has no standing to continue this case absent plaintiffs-respondents

Yniguez and Gutierrez. ACT does not represent any class of state employees, and has not alleged any specific actual or threatened injury to its members. Absent some showing of specific injury, ACT cannot seek an advisory opinion as to the scope of the Arizona Amendment.

2. Assuming this Court determines that this case is not moot, Petitioners, who were granted leave to intervene as authors and principal supporters of the Amendment, have standing to obtain review of the sweeping declaratory judgment. Where, as here, executive officials fail or refuse to seek review to defend the constitutionality of legislation, this Court has allowed standing to legislators, or representatives of the legislature. In the instant case, the court of appeals properly held that Petitioners occupy a position analogous to legislators, because they authored the ballot initiative and successfully guided its enactment. Initiatives and referenda will often only be defended by their authors; the peoples' will should not be thwarted by leaving defenses of such measures solely in the hands of State officials.

3. Assuming the Court reaches the merits of this action, the Court should uphold the constitutionality of the Arizona Amendment on the basis that the Attorney General's Opinion was controlling and correct. The Court has repeatedly held that legislation should not be facially invalidated where state officials have interpreted and applied it in a constitutional manner. That principle is particularly forceful in the case at bar, in which Plaintiffs do not dispute that the Attorney General's opinion interprets the Amendment consistent with the First Amendment. The lower courts mistakenly failed to preserve the plainly constitutional applications of the Amendment, and improperly invalidated all possible applications. The judgments of the lower courts should be reversed, and this Court should hold that the Amendment, as interpreted by the Attorney General, is constitutional.

ARGUMENT

I. The Judgment Must Be Vacated Because The Case Has Become Moot.

The district court did not have jurisdiction to reach the merits of this lawsuit because no live case or controversy exists among the parties. Accordingly, the judgment below must be vacated and the case must be remanded with directions to dismiss. *See U.S. v. Munswinger,* 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss").

Article III limits the jurisdiction of the federal courts to "cases and controversies." *Flast v. Cohen*, 392 U.S. 83, 94 (1968). The case or controversy requirement must be met at every stage of the litigation. *Prieser v. Newkirk*, 422 U.S. 395, 401-02 (1975). If subsequent events moot the question sought to be adjudicated, the case must be dismissed. *Id.* at 95. A case is moot where the controversy between the parties is "no longer live" or the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

As set forth below, this case is moot for two independent reasons.

A. This Case Is Moot Because Neither Yniguez Nor Gutierrez Is Currently Employed By The State Of Arizona.

Yniguez and Gutierrez, the original plaintiffs in this action, are no longer employed by the state of Arizona, and did not seek class certification. Thus, Plaintiffs have no legally cognizable interest in the declaratory judgment issued below, and this case is moot. The declaratory judgment must be vacated and the case must be remanded with directions to dis-

miss. *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Feit v. Ward*, 886 F.2d 848, 856-858 (7th Cir. 1989).

B. Alternatively, No Case Or Controversy Exists, Because The Attorney General's Opinion Makes Clear That The Arizona Amendment Does Not Apply To Plaintiffs' Conduct.

In the present case, all parties are in agreement that the Arizona Amendment, as interpreted by the Attorney General, would not apply to Plaintiffs' day-to-day employment duties. This Court's decisions hold that in such circumstances no Article III case or controversy exists sufficient to continue the jurisdiction of the Court.

The case or controversy limitation on federal court jurisdiction often arises in cases where the plaintiff challenges the constitutionality of a state law. The federal courts routinely deny jurisdiction when a plaintiff challenges a state law that the state authorities agree is inapplicable to plaintiff's conduct.

In *Poe v. Ullman*, 367 U.S. 497, plaintiffs challenged, as violative of the First and Fourteenth Amendments, a Connecticut statute which imposed criminal penalties for the use of any contraceptive drug or device. The Court, in a *per curiam* opinion, held that the case presented no justiciable controversy because there was no real threat of enforcement against the plaintiffs. The Court reasoned that "if a state prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed in the United States Supreme Court." *Id.* at 507-508.

The lower courts have frequently applied the holding of *Poe* to other First Amendment cases where the plaintiffs could not demonstrate a justiciable controversy between plaintiffs and the state defendants. For example, *in Graham v. Butterworth*, 5 F.3d 496 (11th Cir. 1993), plaintiff, a candidate for

judicial office, challenged the constitutionality of a state election law on the ground, *inter alia*, that "The statute . . . is overbroad and has a chilling effect on political speech." *Id.* at 498. The court held that at the time plaintiff filed the lawsuit, he had standing to challenge the law because he was threatened with prosecution. *Id.* The court, however, determined that the case was moot because after the lawsuit was filed, the state authorities withdrew their initial determination that the plaintiff's intended conduct was within the ambit of the statute, and notified plaintiff that his campaign conduct was not prohibited. *Id.* The court, therefore, held that no case or controversy existed between the parties and dismissed the case on the basis of mootness.

A similar result was reached in *Arlington County Republican Committee v. Arlington County, Virginia*, 983 F.2d 587 (4th Cir. 1993). In that case, political parties and candidates brought a First Amendment challenge to a zoning ordinance which imposed restrictions on the placement of signs in the County. The court held that there was no justiciable controversy between the parties because the County's historical interpretation and application of the zoning ordinance indicated that it would not enforce the ordinance as written. *Id.* at 596. *See also Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1990) (plaintiff lacked standing to challenge constitutionality of zoning ordinance on First Amendment grounds, where city attorney determined that the ordinance did not apply to plaintiff and those similarly situated); *Field v. Brown*, 610 F.2d 981, 991 (D.C. Cir. 1979) (no justiciable controversy existed where assistant attorney general wrote letter stating that he would not enforce the challenged statute); *Delaware Women's Health Organization*, 441 F. Supp. 497, 501 (D.Del. 1977) (no case or controversy existed where attorney general

affirmatively stated that he would not enforce the Delaware abortion statute as applied to physicians).[3]

The present case, like the cases discussed, *supra*, fails to present a justiciable controversy. The Arizona Amendment was passed by ballot initiative in 1988. J. A. 158. When the Arizona Amendment was adopted by the voters of Arizona, Plaintiff Yniguez was employed by the Arizona Department of Administration, where she handled medical malpractice claims asserted against the state. *Id.* at 159. Yniguez communicated with mono-lingual Spanish-speaking claimants in Spanish, and used a combination of English and Spanish with bilingual claimants. *Id.* at 47. Yniquez also drafted various settlement documents, some in English and/or Spanish. *Id.* at 48. After the passage of the Arizona Amendment, however, Yniguez ceased speaking Spanish on the job for fear that her use of Spanish made her vulnerable to disciplinary measures. *Id.* at 159. Plaintiff Gutierrez was a state legislator who spoke Spanish to some of his constituents. Neither Plaintiff has ever, in fact, suffered any disciplinary or other adverse action as a result of the passage of the Amendment.

Shortly after Yniguez filed this action, the Arizona Attorney General issued an opinion (the "Opinion") interpreting the Arizona Amendment. The Opinion of the Attorney General, repeatedly confirmed in this lawsuit as the formal posi-

[3] The Court's opinion in *Virginia v. American Booksellers Assn.*, 484 U.S. 383 (1988) also supports our position that Plaintiffs must show injury in fact to themselves, and that no such showing has been made here. There, several booksellers and their association were granted standing to make a First Amendment challenge because (1) they showed that the statute would specifically and seriously injure their continuing business interests, and (2) the Attorney General's construction of the statute did not clearly exempt the booksellers' sales. By contrast, in the instant case Plaintiffs have left state employment and cannot possibly be injured by the Amendment. Moreover, the Attorney General's formal written opinion, and briefs filed in the lower courts, clearly exempt Plaintiffs' actions from the scope of the Amendment.

tion of the State of Arizona, makes clear that the Amendment was not intended to apply, and would not be enforced against, Yniguez or Gutierrez, or others similarly situated.

The Opinion provides that the English mandate only applies to "official acts" of the State Arizona government; that "provision of non-English assistance, whether written or oral, is permissible, and *is required* if it is necessary to reasonably pride fair and effective services;" that "translation services and accommodating communications are permissible, *and may be required*, if reasonably necessary to the fair and effective delivery of services"; and that generally non-English languages may be used to facilitate "the fair and effective delivery of governmental services" or "when reasonable to facilitate the day-to-day operation of government. J. A. 62-65, 68, 71-74. (emphasis added). In addition, the Opinion concluded that "Communications between elected and other governmental employees with the public at large may be in a language other than English, and that the "State may act in a language other than English . . . to comply with [the United States Constitution and] other federal laws." *Id.* at 62, 65, 68, 71-72.

Plainly, the Attorney General's Opinion extinguished any arguable "case or controversy" between the parties. Even assuming there was a reasonable threat of enforcement against Yniguez and Gutierrez to confer standing at the outset of this litigation, the Attorney General's Opinion mooted the question presented to the court. *See Graham, supra.* Further, the parties are in agreement that the State of Arizona may constitutionally require that state statutes, legal opinions, government contracts, deeds, and similar "official" documents be printed in the English language. Under the cases discussed above, the fact that other unspecified private parties may at some future time bring suit and ask for a broader interpretation of the Amendment does not now give the courts jurisdiction over these defendant state officials.

Thus, the federal courts lack jurisdiction over this case because no case or controversy exists between the parties. *See Poe*, 367 at 505 (the Supreme Court will not "entertain cases which disclose a want of a truly adversary contest"). Any opinion on the merits of the issue presented would be advisory only. The judgment of the lower courts must be vacated and the case must be remanded with directions to dismiss. *See Munswinger, supra.*

C. Plaintiffs' Claim For Nominal Damages Does Not Prevent Dismissal Of This Case As Moot.

Plaintiffs claim for nominal damages cannot revive this otherwise moot case. *Memphis Light, Gas & Water Div. v. Croft*, 436 U.S. 1,9 (1978). "The basic proposition which plaintiff[s] . . . seek to establish is the constitutionality of the . . . [Arizona Amendment]. Not having found a justifiable controversy permitting a declaration, the claim for nominal damages, which is clearly incidental to the relief sought, cannot properly be the basis upon which a court should find a case or controversy where none in fact exists." *Kerrigan v. Boucher*, 450 F. 2d 487, 489-490 (2d Cir. 1971); *see Geraci v. Trenchtlinger*, 487 F.2d 590, 592 (2d Cir. 1973); *Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I., 1983).

Moreover, plaintiffs request for nominal damages was not made until *after* the declaratory judgment was issued below and *after* plaintiffs had left state employment. Notwithstanding this fact, the Ninth Circuit held that the case was not moot and permitted plaintiffs to file a cross-appeal seeking nominal damages. This was error. The case should have been dismissed as moot at that time. *See Fox v. Board of Trustees*, 148 F. R. D. 474, 478 (N. D. N. Y. 1993) (complaint which seeks "other just and proper relief" is not sufficient to save a case from mootness).[4]

[4] On remand the District Court awarded her $1.00. None of the parties appeal this award.

Thus, in accordance with *Munswinger, supra*, the declaratory judgment entered below must be vacated and the case must be remanded with directions to dismiss.

D. Intervenors Arizonans Against Constitutional Tampering Cannot Save This Case From Mootness.

The presence of Arizonans Against Constitutional Tampering ("ACT") as an intervenor-plaintiff does not save this case from mootness.

As discussed *supra*, this case is moot as to plaintiffs-respondents Yniguez and Gutierrez. In order to continue this case in its own right, intervenor-plaintiff ACT must independently satisfy the requirements of Article III. *See Diamond v. Charles*, 476 U.S 54, 69 (1986) (intervenor cannot continue a case absent original parties unless the intervenor satisfies Article III). ACT must demonstrate "that [it] personally suffered some actual or threatened injury" as a result of the challenged conduct of the opposing party. *Id.* at 61, quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1975).

ACT cannot satisfy the requirements of Article III. ACT has not alleged that any enforcement action was taken or threatened against any of its members. ACT does not represent a class of state employees. In any event, the Attorney General's opinion, filed well before ACT intervened in this litigation, makes clear that the Arizona Amendment does not prohibit employees from using other languages in the day to day provision of government services, and that the Amendment only requires employees to use English in matters related to "official acts" of the state government. *See* discussion, *supra* at pp. 10-12.

ACT's only interest in this litigation is based on its status as the opponent of the ballot initiative that resulted in the passage of the Arizona Amendment. This does not confer standing upon ACT to seek an advisory opinion as to the scope of the Arizona Amendment. ACT must demonstrate an

actual or threatened injury to itself or its members before it can invoke the jurisdiction of this Court. The mere passage of the Arizona Amendment does not amount to such an injury absent enforcement action against ACT or its members. *See Poe, supra.*

It is clear that ACT does not have standing to continue this case absent the original party-plaintiffs. Accordingly, the presence of ACT as an intervenor-plaintiff cannot breathe life into this otherwise moot case.

II. Petitioners Arizonans For Official English And Robert D. Park Have Standing To Seek Review in This Court.

As the official sponsors of the ballot initiative which resulted in the enactment of Arizona Constitution Article XXVIII (the "Arizona Amendment"), Petitioners Arizonans for Official English ("AOE") and Robert D. Park ("Park") suffered Article III injury in fact as a result of the overbroad declaratory judgment issued below. The State of Arizona and its officials failed to file an appeal of this declaratory judgment, and did not file a petition for certiorari. As sponsors of the initiative, AOE and Park stand in the position of state legislators, who have Article III standing when executive officials fail to defend the constitutionality of a law. AOE and Park thus have Article III standing to obtain review of the adverse declaratory judgment in this Court.[5]

This Court has recognized the standing[6] of legislators to intervene and defend the validity of a state or federal law,

[5] In contrast, ACT, the opponent of the ballot initiative that resulted in the passage of the Arizona Amendment, has not sustained Article III injury in fact. As explained above, p. 13, no actual or threatened enforcement of the Amendment has been initiated against ACT or its members.

[6] In order to establish standing, a party must demonstrate three things: (1) injury in fact; (2) a causal relationship between the injury and the challenged action; and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville Florida*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586, 595 (1993).

where the executive branch of the government declines to do so. In *Karcher v. May*, 484 U.S. 72 (1987), a teacher, along with several students and parents, challenged the constitutionality of a New Jersey law which permitted students to observe a moment of silence before the start of each school day. The plaintiffs alleged that the statute violated the Establishment Clause of the First Amendment. When it became apparent that the named defendants would not defend the statute, two members of the state legislature, Karcher and Orechio, sought and received permission to intervene in their official capacities to defend the lawsuit.

After the district court and the court of appeals held that the statute violated the First Amendment, Karcher and Orechio sought review in this Court. By this time, however, Karcher and Orechio had lost their legislative posts. For this reason, the Court dismissed the case for want of jurisdiction.[7] The Court's opinion, however, recognized the standing of the New Jersey legislature to defend the constitutionality of a New Jersey statute challenged in federal court. *See Id.* at 484 (J. White concurrence) ("It bears pointing out that we have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court"). *See also Burke v. Barnes*, 479 U.S. 361, 363 n.1 (1987) ("We can assume, arguendo, that a House of Congress suffers a judicially cognizable injury when the votes it has cast to pass an otherwise live statute have been nullified by action on the part of the Executive Branch").

[7] The Court held that "the authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded Karcher and Orechio in office." *Id.* at 477. The case was dismissed because Karcher and Orechio's successors withdrew the appeal and there was thus no case or controversy.

AOE and Park, as the official sponsors of the ballot initiative which resulted in the passage of the Arizona Amendment, occupy a position which is substantially identical to a state legislator or a representative of a legislature. *See* J.A. 157. They introduced the ballot initiative and campaigned for its enactment in much the same way a legislator introduces a new bill and lobbies for its support. If the author of an initiative measure had no standing to defend its constitutionality, the will of the people would often be thwarted by hostile or indifferent state officials.

AOE and Park are not simply "concerned bystanders" who have no direct interest in the outcome of this case. Petitioners invested considerable time and effort into the passage of the Arizona Amendment and they have a strong interest in its vitality. Indeed, Arizona law bestows specific rights and duties upon the sponsor of a ballot initiative which recognizes the sponsor's superior interest in the initiative as compared to the voters at large. *See* Ariz.Rev.Stat. § 19-111 (sponsor of ballot initiative must file an application with the secretary of state); § 19-122 (if an application for a ballot initiative is rejected, the secretary of state must provide the sponsor with a written statement of the reasons for the rejection); § 19-124 (the sponsor of a ballot initiative may submit an argument to the secretary of state in support of the initiative).

Thus, just as the New Jersey Legislature satisfied the standing requirements in *Karcher*, *supra*, Petitioners AOE and Park meet those requirements in the present case. The invalidation of the Arizona Amendment by the lower courts caused AOE and Park an injury in fact. This injury can be redressed by this Court if the judgment below is vacated, or reversed on the basis that the Attorney General's Opinion controls.

III. Assuming This Court Has Jurisdiction, The Judgment Below Should Be Reversed Because Approval of the Attorney General's Opinion, Not Facial Invalidation, is the Proper Remedy.

The opinion below erred in ruling that the entire Arizona Amendment was facially invalid. No application of the Amendment was saved -- even admittedly Constitutional provisions such as that requiring use of English in court opinions and similar official documents. In so holding, the majority opinion below conflicts with numerous Supreme Court opinions, which have consistently held that in a case such as this one, where the challenged statute has a broad range of legitimate applications, the more appropriate remedy is to restrict the scope of the statute to cure any constitutional infirmities.

Facial invalidation of a statute challenged on constitutional grounds is "the exception" and "has been employed by the Court sparingly and only as a last resort." *Broadrick v. State of Oklahoma*, 413 U.S. 601, 613, 615 (1973). Courts must exercise caution and restraint in considering a facial challenge so as to avoid "unnecessary interference" with a state's policy choices. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Facial invalidation is only proper where the threat of unconstitutionality is both *real* and *substantial* when compared to the statute's legitimate sweep. *Broadrick*, 413 U.S. at 615. Only if the "overbreadth of the . . . statute, in relation to its legitimate reach, is substantial" will it "warrant a declaration of facial invalidity". *Brockett v. Spokane*, 472 U.S. 491, 503 fn. 12 (1985). The Court is reluctant to invalidate a statute in its entirety when the challenged law has at least some legitimate application. *See Broadrick*, 413 U.S. at 616-17.

Moreover, the Court will not entertain a facial challenge when a narrower remedy will fully protect the litigants. In *U.S. v. National Treasury Employees Union*, __ U.S. __, 115 S.Ct. 1003 (1995), a class of plaintiffs composed of all Ex-

ecutive Branch employees below GS-16 challenged the constitutionality of a statute that placed a ban on federal employees receiving honoraria for speeches. *Id.* at 1010. The lower courts held that the statute violated the First Amendment and issued an injunction against enforcement of the statute against *any* executive branch employee. *Id.* at 1011-12. This Court agreed that the statute was invalid as applied to the plaintiff class; however, the Court reversed the judgment of the lower court in so far as it purported to invalidate the statute as applied to the *entire executive branch*. *Id.* at 1018-19. The Court reasoned that "although the occasional case requires us to entertain a facial challenge in order to vindicate a party's right not to be bound by an unconstitutional statute, we neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants") (internal citations omitted.) *Id.* at 1018. The Court noted that the activities and status of non-parties might be quite different from those of the plaintiff class. *Id.* at 1019.

The declaratory judgment issued below is manifestly overbroad under the standards set forth in *Broadrick* and *National Treasury Employees Union*. Facial invalidation is not appropriate, where, as here, the challenged statute has a wide range of legitimate applications. For example, there is no question that the Arizona Amendment is constitutional in requiring all official government documents to be prepared in English, and requiring all court and administrative hearings to be conducted in English or with English translation.

Even assuming the Amendment prohibited the speech of Yniguez and Gutierrez and others similarly situated, the court could have protected the Plaintiffs by fashioning a far narrower remedy. Indeed, the Arizona Attorney General issued a formal opinion interpreting the Amendment to apply only to "official" acts or government functions, not to Plaintiffs' day-to-day duties. Adoption of the Attorney General's opinion would have saved the Amendment from total invalidation while fully protecting the Plaintiffs.

This Court has repeatedly stated that a statute that is "readily susceptible" to a narrowing construction is not subject to facial invalidation. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 482 (1988); *Erznoznik*, 422 U.S. at 216 (1975). In judging the constitutionality of a state law, the Court has regularly relied upon interpretations of the challenged statute by state officials and/or agencies -- some far less authoritative than those of the Arizona Attorney General here. *See, e.g., Frisby*, 487 U.S. at 483 (construing picketing ordinance narrowly to save its constitutionality and stating that "This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the 'picketing' proscribed by the ordinance"); *see also Broadrick*, 413 U.S. at 617-18 (referring to State Personnel Boards' interpretation of the statute in question and stating, "Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute"); *Bellotti v. Baird*, 428 U.S. 132, 143 (1976) ("the interpretation placed on the statute by appellants in this Court is of some importance and merits attention because they are the officials charged with the enforcement of the statute"); *Law Students Research Council v. Wadword*, 401 U.S. 154, 162 (1971) (accepting the interpretation of state enforcement officials despite the "language of the Rule [which] lends itself to a construction that could raise substantial constitutional questions").

Prior decisions of this Court make clear that the proffered narrowing construction need not be the most natural reading of the statute. In *United States v. X-Citement Video, Inc.*, __ U.S. __, 115 S.Ct. 464, 472 (1994), the Court rejected a strict grammatical construction of statutory language, reasoning that "It is . . . incumbent upon us to read the statute to eliminate . . . [constitutional] doubts so long as such a reading is not plainly contrary to the intent of [the legislature].". In support of this canon of statutory construction, the opinion cited the analysis in *Debartolo Corp. v. Fla. Gulf Coast*

Building and Construction Trades Council, 485 U.S. 568, 575 (1988), which quoted *Hooper v. California*, 155 U.S. 648, 657 (1895). The latter case interpreted a California penal statute in a manner which avoided constitutional problems, stating that "'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Debartolo*, 485 U.S. at 575. *See also Ehlert v. United States*, 402 U.S. 99, 105-106 (1971) (Army General Counsel's opinion as to meaning of draft statute accepted to save constitutionality of statute, where opinion was "plausible . . . but not the only possible [construction]").

In the instant action, the Arizona Attorney General issued an opinion construing the amendment to apply only to the "official acts" of government. This construction of the Amendment was reasonable under the standards set forth in *X-Citement*, *supra*. The lower courts did not even contend that this construction conflicted with the intent of the framers of the Amendment, or the general understanding of the electorate. The Attorney General's opinion is also consistent with the language of the Amendment. The Amendment (including its title) repeatedly refers to English as the "official language" of Arizona. *Webster's Third New International Dictionary*, p. 1566 (1976) defines "official" to mean "formal" and "authoritative." Thus, the Attorney General properly ruled that the Amendment did not apply to informal conversations and writings of government employees.

The lower courts rejected the Attorney General's construction, because Sec. 3(1)(a) of the Amendment, which requires state political units to "act in English", does not contain the word "official". The *X-Citement* opinion, however, teaches that courts should not demand reiteration of words in various parts of a statute when judging its constitutionality. *X-Citement*, 115 S.Ct. at 467. Moreover, Sections 1 and 2 of the Amendment make clear that the Amendment only deals with official or formal English use. Thus, there was no need

to repeat this limitation in Sections 3 or 4, which involve other details regarding when English is or is not required.

Judge Reinhardt's majority opinion is also inconsistent with the *X-Citement* rationale insofar as it insisted on a rigid grammatical construction of the Amendment. Section 3(1)(a) of the Amendment provides that political subdivisions must "act in English". The Attorney General properly determined that "act" in this context means a "decision or determination of a sovereign, a legislative council, a court of justice," relying on *Webster's Third International Dictionary*, *supra*, at 20. The Court of Appeals improperly rejected this interpretation on the ultra-literal basis that this definition was contained under the noun "act", whereas Sec. 3(1)(a) uses "act" as a verb. A similarly rigid grammatical construction was rejected by this Court in *X-Citement*, *supra*.

In sum, the Arizona Attorney General has provided a reasonable interpretation of the Amendment, which carves out its legitimate applications and cures any arguable constitutional defects. It is immaterial that the Opinion is not the most natural reading of the Amendment, or the reading that the lower courts deem to be such. The Opinion demonstrates that the Amendment is "readily susceptible" to a narrowing construction. Even more leeway should be given to state officials in construing their own basic constitutional provisions, especially those which are enacted by citizen referendum and which are particularly in need of administrative construction. The lower courts' action in effect improperly interpreted the Amendment on the basis of interpretations of the various opponents of the initiative -- a clearly improper mode of construction. In keeping with well established precedent this Court should approve the Attorney General's opinion to save the Amendment from facial invalidation.

The Court's decisions narrowly restricting facial invalidation are not simply procedural, but rather constitute a fundamental principle necessary for the proper balancing of pow-

ers in a representative democracy, including the relationship of judicial and legislative powers. The majority opinion below egregiously disrupts that balance, by substituting the views of several judges regarding the official language of state government, in place of a state constitutional provision, approved by a majority of Arizona voters and carefully implemented by an opinion of the elected State Attorney General. The majority opinion below represents an improper application of this Court's standards regarding facial invalidation, and therefore, must be reversed.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* U.S. English respectfully submits that this case is moot, and the judgment below should be vacated. In the event the Court reaches the merits of this case, U.S. English respectfully submits that the judgment below should be reversed and the opinion of the Arizona Attorney General should be adopted to cure any arguable constitutional defects in the Amendment.

Respectfully submitted,

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May 23, 1996